IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1418

THE NEW YORK CENTRAL RAILROAD COMPANY, NEW JERSEY JUNCTION RAILROAD COMPANY, ERIE RAILROAD COMPANY,
Petitioners,

v.

HENRY K. NORTON, Successor Trustee of New York, Susquehanna and Western Railroad Company,
Respondent.

No. 1419

THE NEW YORK CENTRAL RAILROAD COMPANY, NEW JERSEY JUNCTION RAILROAD COMPANY, ERIE RAILROAD COMPANY,
Petitioners,

v.

NEW YORK LIFE INSURANCE COMPANY, THE MUTUAL BENEFIT LIFE INSURANCE COMPANY and THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The New York Central Railroad Company and New Jersey Junction Railroad Company, petitioners, respectfully pray that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled causes.

Opinion Below

The opinion of the Circuit Court, reported in F. 2d , appears in the printed record at pages 116-124 of Central's Appendix, and the order amending the opinion appears at page 135. The opinion of the Circuit Court in the Trustee's case was filed December 19, 1946 (C. App., p. 116). The petition for rehearing was filed January 13, 1947 (C. App., p. 127). The opinion in the Insurance Companies' case was filed January 16, 1947 (C. App., p. 124). The petition for rehearing in the Trustee's case was docketed in the Insurance Companies' case also. The orders for judgments in both cases were entered January 16, 1947 (C. App., pp. 125, 126). The petitions for rehearing were denied March 7, 1947 (C. App., pp. 135, 136). This petition is filed within three months from that date.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925 (28 U. S. C. 347).

Statutes Involved

Section 70(b) and Section 77 of the Bankruptcy Act (11 U. S. C. 110, 205) and Section 1(18) of Part I of the Interstate Commerce Act (49 U. S. C. 1), the pertinent provisions of which are set forth in the appendix to this petition.

Statement of the Matter

The New York, Susquehanna and Western Railroad Company (herein called the Susquehanna Company) is the

Debtor in proceedings for reorganization under Section 77 of the Bankruptcy Act, pending in the United States District Court for the District of New Jersey.

During such proceedings the Trustee of the Debtor acquired the section of railroad known as the Edgewater Section, located in the vicinity of Edgewater, New Jersey, by purchase from the Erie Terminals Railroad Company (herein called the Terminals Company), in connection with the settlement of controversies between him and the Trustees of the Erie Railroad Company, which company was also in process of reorganization under Section 77 of the Bankruptcy Act (Pt. II, pp. 226, 271).*

Pursuant to such settlement the Edgewater Section was conveyed by the Terminals Company to the Susquehanna Trustee, and at the same time all agreements relating to the property were assigned to him by instrument under which he assumed and agreed to be bound by and to perform, fulfill and carry out all liability and obligation of the Terminals Company under said agreements, such assumption and agreement to be binding upon his successors and assigns (Pt. II, pp. 450, 463, 469, 471).

Shortly thereafter, the Susquehanna Trustee served notice upon the New Jersey Junction Railroad Company and its lessee, The New York Central Railroad Company, the petitioners herein (called the Central and Junction Companies), purporting to reject or disaffirm certain agreements relating to establishment and operation of the Edgewater Section as a joint facility (Pt. II, p. 483). In issuing such notice the Trustee apparently assumed that he had the power to do so under Section 70(b) of the Bankruptcy Act, or as a trustee vested with the powers of an equity receiver.

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* The references to the Trustee's appendix are made thus: (Pt. I, p.) and (Pt. II, p.); and references to the Central's appendix are made thus: (C. App., p.); and references to the Erie's appendix are made thus: (E. App., p.).

The Central and Junction Companies thereupon petitioned the District Court having charge of the Susquehanna reorganization to set aside the notice of rejection and enforce their rights under said agreements in the Edgewater Section (Pt. I, p. 5a).

The Erie Railroad Company also petitioned the District Court to set aside the notice of rejection and enforce the assumption agreement made by the Trustee (E. App., p. 1a).

After trial of the issues, the District Court set aside the Trustee's notice of rejection and instructed him to take no action in furtherance of said notice (Pt. I, p. 475a).

The Trustee's acquisition of the Edgewater Section had been approved and authorized by the Interstate Commerce Commission pursuant to Section 5 (2) of the Interstate Commerce Act (249 I. C. C. 777), wherein the assumption of obligations by the Trustee under the agreements here in question was among the terms and conditions found by the Commission to be just and reasonable in granting its approval of such acquisition (Pt. II, pp. 355, 357).

Similarly, in each instance, the District Courts which respectively authorized the Susquehanna Trustee and the Erie Trustees to consummate the settlement had before them and approved the terms of such settlement which provided that the Susquehanna Trustee would "Assume, such assumption to be binding upon his successors and assigns, the duties and liabilities of Erie Terminals Railroad Company under existing contracts and leases in connection with said Edgewater Section" (Pt. II, pp. 236, 241, 276, 285).

And the Board of Public Utility Commissioners of New Jersey authorized the Terminals Company to convey the Edgewater Section to the Susquehanna Trustee upon like terms (Pt. II, pp. 409, 412).

Previously in a proceeding to determine the extent and priority of the liens of the various mortgages of the Susquehanna Company, it had been determined that none of such mortgages was a lien upon any property owned or held by the Terminals Company, which included among other property its interest in the Edgewater Section. *In re New York, S. & W. R. Co.*, 109 F. 2d 988, 995, certiorari denied 310 U. S. 633 (Pt. II, pp. 568, 587, 594).

The Edgewater Section is part of a joint railroad facility which was established to avoid the duplication of railroad facilities. The basic agreement of 1904, providing for this joint facility, was perpetual in duration and contained no provision for termination or forfeiture by reason of default or otherwise. The Susquehanna Company was not a party to that agreement (Pt. II, p. 86).

Under that agreement the parties granted to each other the right to use and enjoy their respective sections of the joint facility for the transportation of freight and passengers (Pt. II, p. 88). The trains, cars and engines of the parties were to have equal rights and privileges, and the operations were to be subject to rules and regulations to be mutually agreed upon (Pt. II, pp. 88, 91). Each party had the right to construct and use switches, sidings, extensions and connections along either section, and in case either party failed to complete its section the other party was authorized to construct and have exclusive use thereof (Pt. II, pp. 90, 91). Each party was required to bear one-half of an interest charge on the cost of the other's section and to share the cost of maintenance and taxes on a "user" basis (Pt. II, pp. 89, 91).

During the pendency of these proceedings, the Insurance Companies, respondents herein, requested the Commission to include in the plan of reorganization a provision for rejection of the agreements (C. App., p. 76a). Division 4 of the Commission denied such request, finding "that the

plan with the inclusion therein of the requested disaffirmance provision would not be compatible with the public interest" (257 I. C. C. 593, 668) (C. App., p. 78a). This was affirmed later by the full Commission which determined, both as to the question of public interest and the circumstances and conditions under which the acquisition of the Edgewater Section was authorized and consummated, "that the requested provision conditionally rejecting the basic contracts should not be approved by us as part of the plan" (261 I. C. C. 101, 117) (C. App., p. 87a).

The plan of reorganization has been certified by the Commission to the District Court, and is awaiting hearing in that Court on objections to the plan filed by the Trustee, the Insurance Companies, and others.

Questions Presented

The general question presented is whether the Trustee had any authority in law to issue the purported notice of rejection as to the basic 1904 and 1911 agreements. This question in turn is dependent upon the answers to the following specific questions:

May the Trustee, in connection with his acquisition of a section of railroad, take an assignment of outstanding agreements relating thereto which had been made by his grantor, and, notwithstanding his affirmative covenant to assume the obligations of such agreements, thereupon under the guise of disaffirmance repudiate them?

Did the agreements of 1904 and 1911 constitute executed grants vesting in the petitioners such property rights in the Edgewater Section as to render the agreement not subject to disaffirmance in connection with the reorganization of the Debtor?

May the Trustee by disaffirmance modify or annul the terms and conditions imposed by the District Court and the Interstate Commerce Commission in authorizing him to acquire the Edgewater Section?

Was the action of the District Court in setting aside the notice of rejection proper in light of the determination by the Commission in the plan proceeding that rejection of the agreements would not be compatible with the public interest?

Position of the Petitioners

The Circuit Court wrongfully held that the action of the District Court was premature in setting aside the Trustee's notice of rejection. If there was any element of prematurity in the case, it involved the action of the Trustee in issuing the notice.

Not only did the Trustee lack authority to issue such notice, since the only course open to him was through proceedings before the Commission, but he had no legal right to disaffirm the agreements.

The bankruptcy law does not confer upon a Trustee any right to take an assignment of agreements and thereupon disaffirm them. Here the Trustee expressly agreed to bind himself and his successors and assigns to the obligations of his assignor under the agreements.

This does not present a question of disaffirmance but one of repudiation. The Trustee acquired the Edgewater Section and assumed the agreements with the approval of his custodial Court. He should be held to his obligations.

The Trustee obtained authority from the Commission to purchase the Edgewater Section upon terms and conditions which required his assumption of obligations under the agreements. He should not be permitted in a collateral

proceeding to modify such terms and conditions by disaffirmance.

The petitioners were vested with property rights in the Edgewater Section under the agreements. These rights had been granted to them, not by the Susquehanna Company, but by others in the creation of the joint railroad facility. The grant was made in perpetuity, without termination or forfeiture provisions, and provided for use and enjoyment of the property on an equal basis, and even exclusive use if occasion therefor should arise under the terms of the grant.

The bankruptcy law does not provide the means whereby a Trustee may acquire property and extinguish rights of this nature which had been granted to others in the joint use of the property. Nor would that be permissible under the bankruptcy clause of the Constitution.

The Commission has determined that this joint railroad facility should be maintained as established under the agreements, both as regards the public interest and the circumstances under which the Trustee acquired the Edgewater Section. Such determination should conclude the matter; in any event, it may not be attacked collaterally.

Reasons for Granting the Writs

The decision of the Circuit Court improperly applies, and conflicts with the principles laid down by this Court in *Thompson* v. *Texas Mexican Ry. Co.*, 328 U. S. 134, and *Smith* v. *Hoboken R. Co.*, 328 U. S. 123.

The Circuit Court has decided important questions which should be reviewed by this Court, with respect to the application of Section 77 of the Bankruptcy Act to rights of others in property or agreements which the Trustee has acquired by assignment or purchase.

Important questions are presented which should be reviewed by this Court, with respect to the administration of the Bankruptcy Act and the Interstate Commerce Act, and the relative powers and duties of the Trustee, the District Court and the Interstate Commerce Commission.

WHEREFORE, the petitioners pray that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Third Circuit in these cases.

Respectfully submitted,

JACOB ARONSON,
JOHN A. HARTPENCE,
SAMUEL H. HELLENBRAND,
Attorneys for Petitioners, The New York Central Railroad Company and New Jersey Junction Railroad Company.

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NEW YORK LIFE INSURANCE COMPANY, THE MUTUAL BENEFIT LIFE INSURANCE COMPANY and THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Preliminary Statement

We refer to the foregoing petition for a citation of the opinion below, statement of grounds of jurisdiction, citation of statutes involved, and a summary statement of the facts of the case.

Argument

The Circuit Court committed fundamental errors in its decision, not alone in its view that it was unnecessary to pass upon the legal authority of the Trustee to disaffirm the agreements, but in holding that the District Court acted prematurely in setting aside the Trustee's notice of rejection.

The notice did not reflect merely "the trustee's determination to disaffirm the agreements" in advance of proceedings before the Commission (C. App., p. 135). The Trustee issued the notice to effectuate disaffirmance with all its legal consequences. If any question of prematurity is presented in this case, it was not the action of the District Court but that of the Trustee which was premature. His action was not merely premature—he had no legal right to disaffirm the agreements.

The Circuit Court assumed that the District Court had proceeded to a hearing "as if under Section 77(o)" (C. App., pp. 120, 135), which requires action by the Commission. That section, however, deals with abandonment of lines of railroad of the "debtor," and not lines of others. The proceeding in the District Court was not brought under Section 77(o) of the Bankruptcy Act, nor was it considered or dealt with as such a proceeding. The Trustee had issued notice of rejection on his own initiative, without instructions of his custodial Court, seeking by disaffirmance to eject petitioners from the Edgewater Section.

The issues presented to the District Court involved primarily the question whether a right of disaffirmance existed at all—not simply a question whether the Trustee should be permitted to exercise a right of disaffirmance. The petitioners contended that the agreements were not subject to disaffirmance, because (a) the Trustee by his own agreement had assumed the obligations of his as-

signor under agreements relating to the Edgewater Section, as binding upon him and his successors and assigns, pursuant to terms of settlement approved by his custodial Court, (b) the terms and conditions upon which the Trustee was authorized by the Commission to purchase the Edgewater Section required him to assume and bind his successors and assigns to the obligations of his grantor under agreement relating to the property, and (c) the petitioners were vested with property rights in the Edgewater Section which the Trustee's predecessor in title had granted to them under the basic agreements. These were legal questions requiring judicial determination, and the District Court properly proceeded within its jurisdiction to hear and decide them.

Furthermore, the matter of disaffirmance has been before the Commission in the plan proceeding, and not only Division 4 but the full Commission have specifically declined to include in the plan a provision for rejection of the agreements, holding that disaffirmance of the agreements would neither be compatible with the public interest nor consistent with the circumstances and conditions under which the Trustee was authorized to acquire the Edgewater Section (C. App., pp. 78a, 87a).

The Decision of the Circuit Court Conflicts With, and Misapplies the Decisions of This Court in the *Tex-Mex* and *Hoboken Railroad* Cases

In both these cases, *Thompson* v. *Texas Mexican Ry. Co.*, 328 U. S. 134, and *Smith* v. *Hoboken R. Co.*, 328 U. S. 123, a legal right of termination was expressly reserved under the instruments in question, to the grantor of trackage rights in one instance, and to the lessor of railroad property in the other, and this Court held that such right should not be exercised or enforced prior to determination by the Commission in appropriate proceedings as to the proper

treatment of the trackage agreement or lease in the reorganization of the grantee or lessee.

The Circuit Court seeks to apply these decisions in support of its ruling that the action of the District Court was premature in setting aside the Trustee's notice of rejection prior to determination by the Commission of the question whether the trackage or railroad of petitioners may be abandoned (C. App., pp. 121, 122, 123). But the proper application of these decisions would require that the Trustee's notice be set aside, not that the District Court's order be vacated. The effect of the Circuit Court decision is to leave open and outstanding a notice of rejection, which, according to the decisions of this Court, the Trustee had no authority to issue. The decision of the Circuit Court therefore conflicts with the principles stated by this Court in the cases mentioned. It was the action of the Trustee, in summarily issuing notice purporting to disaffirm the agreements, that was inconsistent with the procedure required under the decisions of this Court.

The Trustee had a legal duty to maintain the status quo of the agreements pending decision by the Commission.

Furthermore, this case has an additional feature which was not present in the *Tex-Mex* and *Hoboken Railroad* cases. Here the matter of rejection of the agreements was submitted to the Commission, and the Commission has rendered its decision refusing to make provision for such rejection in the plan of reorganization. The reports and orders of the Commission were before the District Court in the hearing of this case (C. App., pp. 71a, 79a). The Circuit Court states in its opinion that there was no certification to the District Court by the Commission "of any matter respecting the plan of reorganization including the trackage rights" (C. App., p. 121). This would appear to be merely a play upon words. The refusal of the Commission to provide for rejection of the agreements as part of the plan accomplished the same result.

In the light of the decision of the Commission the order of the District Court setting aside the Trustee's notice of rejection was proper.

The Trustee Had No Legal Right to Disaffirm Agreements Assumed by Him as a Contracting Party

The Bankruptcy Act does not confer upon a Trustee any power, nor would such power be permissible within constitutional limitations, to disaffirm agreements which he has acquired through assignment from others. Nor does the Bankruptcy Act provide the means whereby a Trustee may acquire property and thereupon extinguish rights of others in the use of such property.

Here the Trustee acquired the Edgewater Section from the Terminals Company, a solvent company, together with its interest in agreements relating to the property, and at the same time the Trustee expressly assumed and bound his successors and assigns to the obligations of the Terminals Company under such agreements (Pt. II, p. 471).

The Trustee's custodial Court had approved terms of settlement, under which the Trustee acquired the Edgewater Section, providing that he would "Assume, such assumption to be binding upon his successors and assigns, the duties and liabilities of Erie Terminals Railroad Company under existing contracts and leases in connection with said Edgewater Section" (Pt. II, pp. 276, 285).

The District Court in Ohio, having charge of the Erie reorganization, had authorized the Erie Trustees to consummate settlement on the same basis (Pt. II, pp. 236, 241).

The petitioners, Central and Junction Companies, derived their rights in the joint use of the Edgewater Section from the Edgewater Company, a corporate predecessor of the Terminals Company, under the basic agreement of 1904,

which was modified in some respects by the agreement of 1911 (Pt. II, pp. 86, 116).

It was represented in the proceedings before both said Courts that the rights of petitioners under the agreements would not be disturbed in any way as a result of the settlement (Pt. II, pp. 254-255, 289, 291).

Further, as between Counsel for the Trustee and Counsel for the Insurance Companies (the latter being also Special Counsel for the Trustee herein), it was distinctly understood that the provision for binding successors and assigns would include the reorganized Susquehanna Company (Pt. I, pp. 290a, 291a).

In view of all these circumstances, under which the Trustee acquired agreements and assumed obligations thereunder, it is apparent that the question presented here is not one of disaffirmance but of repudiation. The exercise of powers conferred upon the Trustee by the Bankruptcy Act are "subject to the control of the judge" (Section 77(c)(2)). The Trustee should be required to perform obligations which he has assumed as a contracting party with the approval of his custodial Court.

Not for that reason alone, which indeed should be sufficient to hold the Trustee to his obligations, but, apart from any question of property rights, the agreements granted to petitioners such rights in the Edgewater Section as may properly be enforced by specific performance. *Union Pacific Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 163 U. S. 564, 600.

The Circuit Court held that the District Court did not err in finding "that the trustee assumed the 1904 and 1911 contracts when he acquired title to the Edgewater Section" (C. App., p. 119). Thus, within the framework of its own decision, the Circuit Court should have affirmed the order of the District Court setting aside the Trustee's notice of rejection.

The Attempt by the Trustee to Disaffirm the Agreements Is a Collateral Attack Upon the Order of the Commission in the Acquisition Proceeding

The Trustee is bound by the terms and conditions upon which the Commission authorized him to acquire the Edgewater Section. Among such terms and conditions, proposed by the Trustee himself and incorporated in the report of the Commission, was the provision that "the applicant and its successor and assigns will assume all liability and obligation of every nature which now exists under and by virtue of prior contracts, agreements, leases, and licenses which now exist upon the property, and agree to perform, fulfill, and carry out all the liability and obligation of the predecessor company party to the contracts" (Pt. II, p. 355).

In his application to the Commission under Section 5(2) of the Interstate Commerce Act for permission to acquire the Edgewater Section, the Trustee referred particularly to the agreements involved in this case as among those to be assigned to him, under which he would assume the duties and liabilities of the Terminals Company as binding upon his successors and assigns (Pt. II, pp. 305-7).

At the hearing in the acquisition proceeding the present Trustee (then Executive Officer for the Trustee) testified that there was no intention to alter in any way the rights of petitioners and that their rights should remain intact (Pt. II, pp. 366, 369).

It is clear that the Trustee's acquisition of the Edgewater Section was approved by the Commission upon the basis of his application, his unequivocal testimony, and his agreement to assume the obligations of the Terminals Company under the joint railroad agreements. Such assumption was therefore one of the "terms and conditions" which the Commission, as a condition precedent to granting its

approval of the acquisition, was required by Section 5(2) of the Interstate Commerce Act to find, and which it did find, to be just and reasonable.

Having sought and obtained the approval of the Commission, the Trustee should not now be permitted to attack collaterally the order granting such approval, and by the process of disaffirmance to nullify the terms and conditions upon which the order was granted.

The acquisition order may be reviewed only through the procedure provided in the Urgent Deficiencies Act and the Judicial Code. 28 U. S. C. A. Sec. 41(28), 47. It is not subject to collateral attack. *Interstate Commerce Commission* v. *Consolidated Freightways*, 41 F. Supp. 651, 655, D. C. N. D.; *Venner* v. *Michigan Central R. Co.*, 271 U. S. 127, 130. *Cf. Board of Public Utility Commissioners* v. *United States*, 21 F. Supp. 543, 547; *Powell* v. *United States*, 300 U. S. 276, 288. See also *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561.

The Petitioners Are Vested With Property Rights in the Edgewater Section which Cannot be Disaffirmed

This is not a case of simple trackage rights. The joint railroad facility at Edgewater is in every essential respect a joint railroad, created under the basic agreement of 1904 for the joint use of the parties, in place of separately projected railroads, and vesting the parties with equal rights in the use of their respective sections of the railroad. road.

The Bankruptcy Act provides that the rejection of a lease by the Trustee of the lessor "shall not deprive the lessee of his estate." Section 70(b). True, there was not here a lease, but the basic agreement created at least equal if not greater rights. The grant of 1904 was perpetual in duration and neither terminable nor subject to forfeiture.

It constituted an executed grant of permanent rights in the use of the property.

The Edgewater and Shore Line Companies, original parties to the 1904 agreement, granted to each other equal rights, not of trackage alone, but of the use and enjoyment of their respective sections of the joint railroad, together with the right to construct and use tracks on either section, and if there should be occasion therefor even to construct and have exclusive use of the section of the other party (Pt. II, pp. 88-91).

The right to build a railroad upon the located route of another company with its consent was authorized under the laws of New Jersey and recognized as a franchise right. New Jersey Statutes, Title 48:12-36; *Greenville & Hudson Ry. Co.* v. *Grey, Atty-Gen.*, 62 N. J. Eq. 768, 773. Even the abandonment of the Edgewater Section by the Trustee would not preclude petitioners from using the property for their railroad purposes.

Nor was the Susquehanna Company a party to the 1904 agreement. The rights of petitioners thereunder were granted to them by the Edgewater Company, corporate predecessor of the Terminals Company. The Trustee acquired the Edgewater Section from the Terminals Company, and holds title in his own right as a grantee. We are not dealing here with property which came into the hands of the Trustee from the Debtor. That the Edgewater Section was not property of the Debtor is indicated in the decision of the lien controversy, that none of the Susquehanna mortgages was a lien upon the Edgewater Section. *In re New York, S. & W. R. Co.*, 109 F. 2d 988, 995, certiorari denied 310 U. S. 633.

The bankruptcy clause of the Constitution was never intended to impair the security of vested rights in property to serve the interest of creditors of an insolvent estate. *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555,

589. Much less is there any authority for a Trustee to acquire property and divest others of their rights in the property.

Conclusion

The issues presented by these cases are of great importance. This joint railroad facility has been in existence for almost 40 years. It was established to avoid the duplication of railroad facilities, and is consistent with the national transportation policy later declared by Congress in the Interstate Commerce Act. The public interest requires the continuance of benefits long enjoyed by the industries located in this area. The District Court and the Commission have both held that disaffirmance of the basic agreements would not be compatible with the public interest.

The issues also present a further important question as regards the integrity of action taken by the Trustee and agreements made by him in connection with his acquisition of an interest in this joint railroad facility. The process of bankruptcy does not lend itself to be used as a device to destroy rights in the manner here sought to be accomplished by the Trustee.

Without undertaking at this time to present an adequate argument on the merits of the questions presented, we submit that the petition for writs of certiorari should be granted in order that the Court may review the decision of the United States Circuit Court of Appeals for the Third Circuit.

Respectfully submitted,

JACOB ARONSON,
JOHN A. HARTPENCE,
SAMUEL H. HELLENBRAND,
Attorneys for Petitioners, The New York Central Railroad Company and New Jersey Junction Railroad Company.

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Respondents.

MEMORANDUM OF ERIE RAILROAD COMPANY IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI OF THE NEW YORK CENTRAL RAILROAD COMPANY AND NEW JERSEY JUNCTION RAILROAD COMPANY TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the Erie Railroad Company, one of the parties in the above entitled causes, and joins in the petition for writs of certiorari in the above entitled causes, and in

support thereof respectfully refers to, concurs in and adopts the petition for writs of certiorari and brief in support thereof, of The New York Central Railroad Company and New Jersey Junction Railroad Company, Petitioners.

Respectfully submitted,

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Attorney for Erie Railroad Company,
1180 Raymond Boulevard,
Newark 2, New Jersey.

M. C. SMITH, JR.,
Of Counsel.

APPENDIX.

The pertinent provisions of the statutes involved read as follows:

BANKRUPTCY ACT, Sec. 70(b); 52 Stat. 880; 11 U. S. C. Sec. 110(b).—"Within sixty days after the adjudication, the trustee shall assume or reject any executory contracts, including unexpired leases of real property: *Provided, however,* That the court may for cause shown extend or reduce such period of time. Any such contract or lease not assumed or rejected within such time, whether or not a trustee has been appointed or has qualified, shall be deemed to be rejected. A trustee shall file, within sixty days after adjudication, a statement under oath showing which, if any, of the contracts of the bankrupt are executory in whole or in part, including unexpired leases of real property, and which, if any, have been rejected by the trustee: *Provided, however,* That the court may for cause shown extend or reduce such period of time. Unless a lease of real property shall expressly otherwise provide, a rejection of such lease or of any covenant therein by the trustee of the lessor shall not deprive the lessee of his estate. A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same shall be enforceable. A trustee who elects to assume a contract or lease of the bankrupt and who subsequently, with the approval of the court and upon such terms and conditions as the court may fix after hearing upon notice to the other party to the contract or lease, assigns such contract or lease to a third person, shall not be liable for breaches occurring after such assignment."

BANKRUPTCY ACT, Sec. 77(b); 49 Stat. 911, 912, 11 U. S. C. Sec. 205(b).—"A plan of reorganization within the meaning of this section . . . may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section. . . .

"The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not preclude a rejection of such contract or lease in a plan of reorganization approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor because such contract or lease had been previously adopted."

BANKRUPTCY ACT, Sec. 77(c)(2); 49 Stat. 914; 11 U. S. C. Sec. 205(c)(2).—". . . The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 44 of this Act or any other section of this Act, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the debtor. . . ."

BANKRUPTCY ACT, Sec. 77(o); 49 Stat. 923; 11 U. S. C. Sec. 205(o).—"The trustee or trustees, from time to time, shall determine what lines or portions of lines of railroad and what other property of the debtor, if any, should be abandoned or sold during the pendency of the proceedings in the interest of the debtor's estate and of ultimate reorganization but without unduly or adversely affecting the

public interest, and shall present to the judge petitions, in which other parties in interest may join, for authority to abandon or to sell any such property; and upon order of the judge made after a hearing pursuant to such reasonable notice by publication or otherwise as the judge may direct to parties in interest, authorizing any such abandonment or sale, but only with the approval and authorization of the Commission when required by the Interstate Commerce Act as amended February 28, 1920, or as it may be hereafter amended, the trustee or trustees shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment or sale in accordance with the order of the judge. Any such order of the judge shall be a final order for the purposes of appeal. The judge may order and decree any sale of property, whether or not incident to an abandonment, under this subsection at public or private sale and subject to or free from liens. The proceeds derived from any such sales shall be received by the trustee or trustees subject, in case the property was sold free from lien, to any liens thereon at the time of sale, and shall be applied or disposed of in such manner as the judge by further order shall direct. The expense of such sale shall be borne in such manner as the judge may determine to be equitable. The judge may order the trustee or trustees of the debtor to deposit such proceeds with any mortgage trustee entitled thereto, to be applied in payment of all or part of such mortgage."

INTERSTATE COMMERCE ACT, Sec. 1(18); 41 Stat. 477, 49 Stat. 543, 54 Stat. 902; 49 U. S. C. Sec. 1(18).—"After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or ex-

tended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks."

IN THE

Supreme Court of the United States

October Term, 1946

Nos. 1418-~~1419~~

THE NEW YORK CENTRAL RAILROAD COMPANY, NEW JERSEY JUNCTION RAILROAD COMPANY AND ERIE RAILROAD COMPANY,

Petitioners,

v.

HENRY K. NORTON, SUCCESSOR TRUSTEE OF NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY,

Respondent.

THE NEW YORK CENTRAL RAILROAD COMPANY, NEW JERSEY JUNCTION RAILROAD COMPANY AND ERIE RAILROAD COMPANY,

Petitioners,

v.

NEW YORK LIFE INSURANCE COMPANY, THE MUTUAL BENEFIT LIFE INSURANCE COMPANY AND THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR HENRY K. NORTON, SUCCESSOR TRUSTEE OF NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY, IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1418

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v.

HENRY K. NORTON, SUCCESSOR TRUSTEE OF NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY,

Respondent.

No. 1419

THE NEW YORK CENTRAL RAILROAD COMPANY, NEW JERSEY JUNCTION RAILROAD COMPANY AND ERIE RAILROAD COMPANY,

Petitioners,

v.

NEW YORK LIFE INSURANCE COMPANY, THE MUTUAL BENEFIT LIFE INSURANCE COMPANY AND THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR HENRY K. NORTON, SUCCESSOR TRUSTEE OF NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY, IN OPPOSITION

Opinions Below

The District Court wrote no opinion, but its findings of fact and conclusions of law appear in the Record at Pt. I, page 457a.*

The opinion of the Circuit Court of Appeals in No. 1418 in its original form appears in the Record at C. App., page 116; the modifications of this opinion, upon the denial of the petitions for rehearing filed by petitioners, appear in the Record at C. App., page 135. The opinion as modified does not appear in the Record, but is reported in 160 F. (2d) 29.

The opinion of the Circuit Court of Appeals in No. 1419 appears in the Record at C. App., page 124, and is reported in 160 F. (2d) 34. The Mutual Benefit Life Insurance Company and The Prudential Insurance Company of America, parties to this matter below, no longer own bonds of the Debtor.

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* The Record filed with the petition consists of (a) the two parts of the Appendix to the Brief in the Circuit Court of Appeals of Henry K. Norton, Successor Trustee, respondent here (appellant below); these are referred to herein as "Pt. I, p. " and "Pt. II, p. "; (b) the Appendix to the Brief in the Circuit Court of Appeals of the New York Central and New Jersey Junction, petitioners here, and appellees below, referred to herein as "C. App., p. "; (c) the additional portions of the record printed for this Court, including the opinions of the Circuit Court of Appeals, the pagination of which follows that of the New York Central Appendix, and which is also referred to as "C. App., p. "; and (d) the Appendix to the Brief in the Circuit Court of Appeals of the Erie Railroad Company, petitioner here, and appellee below, referred to herein as "Erie App., p. ".

Jurisdiction

Petitioners seek to invoke the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347).

Statutes Involved

Sections 70(b) and 77 of the Bankruptcy Act (11 U. S. C. 110, 205) and Section 1(18) of Part I of the Interstate Commerce Act (49 U. S. C. 1) are involved. The relevant portions of these statutes are printed in an appendix to the petition.

Questions Presented

Did the Circuit Court of Appeals err in holding that the decision of the District Court was premature and that the District Court should await certification to it by the Interstate Commerce Commission of the answers to certain questions?

In addition to this question, the petition raises a number of questions which the Circuit Court of Appeals found not to be decisive of the case, and which are discussed in Points II and III of this Brief, pages 15 to 18, *infra*.

Summary Statement of the Matters Involved

This proceeding arises in the reorganization of the New York, Susquehanna and Western Railroad Company ("Susquehanna") under Section 77 of the Bankruptcy Act.

The late Walter Kidde, then Trustee of the Susquehanna, on August 27, 1942, filed a notice of disaffirmance

of, *inter alia,* two contracts with petitioner, New Jersey Junction Railroad Company ("New Jersey Junction"), which is a subsidiary of petitioner, The New York Central Railroad Company ("New York Central") (Pt. II, p. 483). On petition of the New York Central and New Jersey Junction (Pt. I, p. 5a), and of Erie Railroad Company ("Erie") (Erie App., p. 1a), the District Court set aside this notice of disaffirmance (Pt. I, p. 474a).

The Circuit Court of Appeals, on appeals by respondents, the Successor Trustee of the Susquehanna and several of its creditors, vacated this order of the District Court as premature in the absence of a determination by the Interstate Commerce Commission as to the effect of the public interest on relevant questions to be properly presented to it. The proceeding was remanded to the District Court to await presentation of these questions to the Commission (C. App., pp. 116, 124, 135, 137, 138).

Neither the opinion of the Circuit Court of Appeals nor the petition for certiorari presents the history of these matters. Since this history is necessary to an understanding of the controversy, we include the following statement.

The contracts in question, executed in 1904 and 1911, related to the building and use of certain tracks indicated on the chart opposite this page, which is taken from Pt. I, page 327a. The New York Central, through its subsidiary, petitioner New Jersey Junction, owns the so-called Shore Line Section, which extends from "Bulls Ferry" to "N. Y. C. Interch." on the chart. The Susquehanna is now the owner of the Southern Extension, the Edgewater Terminal and the Northern Extension. These tracks are of importance in furnishing access to industrial properties along the New Jersey shore of the Hudson River.

The Susquehanna, prior to its control by the Erie and prior to the making of the 1904 contract, had constructed the Edgewater Terminal, and has owned it at all times (Pt. I, p. 423a). After 1898, the Erie dominated and controlled the Susquehanna through ownership of approximately 99% of its stock. This domination and control continued until the institution of these reorganization proceedings in 1937 (Pt. I, pp. 198a-201a, 389a-403a, 404a-413a; Pt. II, pp. 8, 10-11).

The 1904 contract was actually negotiated by the New York Central and the Erie (Pt. I, pp. 287a-289a). The contract (Pt. II, pp. 86-99) was entered into between a subsidiary of the New York Central and a wholly owned subsidiary of the Susquehanna. It provided that these subsidiaries would construct the tracks here involved (apart from the Edgewater Terminal, which was already in existence). The Shore Line Section was to be constructed by the New York Central subsidiary, the Southern Extension by the Susquehanna subsidiary, and the Northern Extension by either. (In fact, the Northern Extension was constructed by the Susquehanna subsidiary. Pt. II, p. 12.) Each railroad was to have trackage rights over the tracks so constructed by the other, and was to pay annually for such rights 2% of the cost of the other's section as well as a portion of the taxes and maintenance based on use. The 1904 contract had no termination clause.

These additional tracks were constructed pursuant to the 1904 contract (Pt. II, pp. 11-12). Of the total cost of $447,933.27 of the Northern Extension and Southern Extension, the Susquehanna furnished all but $36,582.77, which was furnished by the Erie (Pt. II, pp. 7-8, 16).

In 1907, the Erie caused the Susquehanna's wholly-owned subsidiary to be merged into a new corporation, Erie Terminals Railroad Company ("Erie Terminals") (Pt. I, p. 433a; Pt. II, pp. 57-63). As a result of this merger 600 of the 680 shares of Erie Terminals stock were issued to the Erie and only 80 to the Susquehanna (Pt. I, p. 462a). In the Susquehanna reorganization proceedings the Trustee, as will be seen presently, attacked this merger as a fraud on the Susquehanna.

The physical connection between the Shore Line Section and the Southern Extension was made in 1911, and the 1911 contract, which also had no termination clause, provided that the Susquehanna would move New York Central cars over the Edgewater Terminal for a reasonable switching charge (Pt. II, pp. 116-127). (The 1904 contract had given the New York Central no right to cross the Edgewater Terminal.) Under supplemental contracts, beginning in 1911, the Susquehanna has performed all the operations on the Northern and Southern Extensions, as well as on the Edgewater Terminal, because the congestion in the territory would render impractical operations by more than one railroad (Pt. I, p. 76a; Pt. II, pp. 13-14). Under these supplemental contracts, all of which provided for termination by either party on short notice, the New York Central has paid the Susquehanna the alleged approximate cost of handling the New York Central cars on the Northern and Southern Extensions, as agreed by representatives of the New York Central and of the Erie system (Pt. II, pp. 154-166) and a flat charge per car for switching these cars across the Edgewater Terminal (Pt. II, pp. 128-157). Under these contracts, the Susquehanna has also performed all operations on the Shore Line Sec-

tion except for certain switching at its south end (Pt. II, pp. 13-14).

Such was the situation when the Susquehanna reorganization proceeding was commenced in 1937.

The Susquehanna Trustee, after an investigation of the facts, concluded that the 1907 merger had been fraudulent as to the Susquehanna. He therefore brought suit against Erie Terminals and the Erie to recover the Northern and Southern Extensions (Pt. II, p. 168). At the same time there were claims and counter-claims between the Susquehanna and the Erie (itself in reorganization in the District Court for the Northern District of Ohio) aggregating approximately $9,000,000 in each direction, and including a preferred claim by the Erie of over $400,000 (Pt. II, pp. 228, 271).

These controversies between the Erie and the Susquehanna were compromised in 1942. The Northern and Southern Extensions were restored to the Susquehanna on payment of about $36,500 to the Erie, this representing the only portion of the cost of these extensions not originally paid by the Susquehanna, but paid by the Erie. The other cross-claims were settled by the payment of $250,000 by the Susquehanna to the Erie (Pt. II, pp. 19-22; Pt. I, pp. 342a-368a).

The Susquehanna Trustee intended, and took great pains, to keep open in the settlement his right to disaffirm the 1904 and 1911 contracts (Pt. I, pp. 143a-145a; Pt. II, p. 384). It was found, however, by the District Court (Pt. I, p. 470a, Conclusions I and II) and by the Circuit Court of Appeals (C. App., p. 119) that in the settlement agreement he had assumed the 1904 and 1911 contracts.

On August 27, 1942, the Susquehanna Trustee filed the notice of disaffirmance of the 1904 and 1911 contracts here in question (Pt. II, p. 483). The considerations which led to his conclusion that these contracts should be disaffirmed, were as follows:

> The territory served by the Susquehanna's Northern and Southern Extensions is heavily industrialized; the territory served by the New York Central's Shore Line Section is sparsely industrialized (Pt. II, p. 15). The fixed annual payment by each road of 2% of the cost of the other's section, provided by the 1904 contract, has resulted in a great disparity in costs as between the two roads. Thus, the Susquehanna, from 1927 to 1943, paid $289,967.27 in interest on the cost of the Shore Line Section, and 9,460 of its cars used that section, so that the interest payments alone averaged $30.65 per car (Pt. I, p. 335a). On the other hand, the New York Central in the same period paid $165,964.69 as interest on the cost of the Northern and Southern Extensions (i.e., the so-called Edgewater Section), while 143,224 of its cars used that section, so that its interest payments averaged only $1.16 per car (Pt. I, p. 335a).
>
> Furthermore, as noted above, the Susquehanna receives from the New York Central only an alleged approximation of cost for handling its cars, although it receives divisions of the through rates on its own traffic to or from the Edgewater industries. The Susquehanna has handled approximately 30,000 of its own cars per year (Pt. I, p. 73a) to or from interchanges with foreign lines (none of which is far distant) on divisions of the through rates averaging about $30 to $35 per car (Pt. I, p. 62a).
>
> It has handled about 10,000 cars per year for the New York Central under the above-mentioned contractual arrangement (Pt. I, p. 64a) at a total com-

pensation, including the $1 switching charge across the Edgewater Terminal (Pt. II, pp. 155-156), averaging about $8.75 per car (C. App., p. 95a).

It is estimated by the Susquehanna Trustee that the 1904 contract results in a loss of net earnings to the Susquehanna in the handling of New York Central traffic of approximately $200,000 a year (Pt. I, pp. 62a-65a).

Therefore, when on July 25, 1942, shortly after the Susquehanna Trustee had recovered the Northern and Southern Extensions from the Erie and had completed the Dieselization of operations at Edgewater in an effort to effect economies (261 I. C. C. 101, 102-103 (1945)), the New York Central requested a cost study with a view to revising the compensation paid to the Susquehanna for the handling of the New York Central's 10,000 cars or so per annum (Pt. I, pp. 369a-371a), the Trustee served his notice of disaffirmance.

The Susquehanna Trustee believed it would be ineffective merely to terminate the operating contracts supplemental to the 1904 contract, which had from time to time fixed the compensation to be paid to the Susquehanna and were by their terms terminable on short notice (page 6, *supra*), and to try to negotiate new charges for handling New York Central cars, because unless such charges were entirely satisfactory to New York Central, the latter had the right physically to exercise its trackage rights under the 1904 contract, have its locomotives compete with those of the Susquehanna on the crowded Northern and Southern Extensions, and thereby create impossible operating conditions on these Extensions (Pt. I, pp. 76a-78a) which are of vital importance to the Susquehanna; and because, in view of the attitude previously taken by the New York Cen-

tral (Pt. I, pp. 65a, 328a, 331a, 334a), it might well do so. Furthermore, the Trustee believed that so long as the New York Central has trackage rights over the Northern and Southern Extensions under the 1904 contract it is within the power of the New York Central and the Erie to enter into arrangements whereby the Erie Edgewater traffic, now interchanged with the Susquehanna at divisions of the through rates, would be routed instead via the New York Central with the result that either the New York Central would handle the traffic itself, exercising its trackage rights, or the Susquehanna would be obliged to handle it at approximately cost (Pt. I, pp. 92a-95a).

On November 5, 1942, the New York Central filed its petition to set aside the Trustee's notice of disaffirmance (Pt. I, p. 5a).

While this petition of the New York Central was pending in the District Court, the plan of reorganization of the Susquehanna was being considered by the Interstate Commerce Commission. After the record on the plan had been closed, the proponents of the plan, in view of the possibility that the petitioners' contention that the Trustee had assumed the contracts and therefore could not disaffirm them might be sustained, in which event the contracts could only be rejected in the plan (Bankruptcy Act, §77b), and in an effort to reconcile the plan to the results of this litigation, whatever they might be, and to permit the plan proceedings and the litigation to proceed simultaneously, suggested in their brief a provision which, in the form finally proposed, read as follows (257 I. C. C. 593, 667 (1944)):

> "However, in the event that it is adjudicated by the highest court to which the question is presented, or

> it otherwise appears from the decision of such court that the agreement dated April 6, 1904, between the Edgewater and Fort Lee Railroad Company and the New Jersey Shore [Line] Railroad Company, or any agreement supplemental thereto, may not be rejected by the trustee of the debtor, but may be rejected in its plan of reorganization, the plan rejects any of said agreements as to which such a decision shall have been reached and the reorganized company shall not be deemed to have assumed them."

No evidence was taken by the Commission on this proposal since "the proposals (sic) that the plan disaffirms the contracts was made for the first time on brief after the close of the hearings" (257 I. C. C. 593, 667 (1944)), but the Commission nevertheless refused to add the provision to the plan, principally on the ground that it was contrary to the public interest (257 I. C. C. 593, 668 (1944); 261 I. C. C. 101, 115-117 (1945)).

Until after all of the foregoing had taken place, it was not generally understood that under Section 1(18) of the Interstate Commerce Act, one carrier could apply for leave for another to abandon operations. Accordingly no such application was made by the Susquehanna Trustee to the Interstate Commerce Commission for leave to the New York Central to abandon operations over these tracks, as the Circuit Court of Appeals ruled should now be done. It will be recalled that it was not until the decision of this Court in *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134, decided on April 29, 1946 (one week before the argument of the present case in the Circuit Court of Appeals) that it was ruled that such an application could be made.

The plan of reorganization approved by the Interstate Commerce Commission was certified to the District Court

on March 5, 1945, but in view of the pendency of this litigation, the outcome of which may depend on the availability of rejecting the contracts in the plan, no further action has been taken thereon. However, all the complicated formula matters, lien controversies and inter-company disputes and claims have been concluded, leaving the present controversy as the sole substantial remaining question.

The District Court held that the Susquehanna Trustee had no power to disaffirm the 1904 and 1911 contracts, for various reasons (Pt. I, pp. 457a-473a). The Circuit Court of Appeals, in vacating the decision of the District Court, disagreed with it on most points, but rested its decision on the conclusion that the action of the District Court was premature in the absence of a certification by the Interstate Commerce Commission, after proper proceedings before it, whether in the public interest there should or may be a termination of the New York Central's trackage rights and operations or a change in the Susquehanna's compensation for handling New York Central cars. This conclusion followed from the Court's application to this case of the principles laid down in *Smith* v. *Hoboken R. Co.*, 328 U. S. 123 (1946), and *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134 (1946).

Argument

Only three reasons are advanced in the Petition for granting the requested writs. Although the reasons are not definite in their language, it would appear that the arguments in the supporting brief relate to one or another of the aforementioned three reasons, as indicated after the headings which follow. We shall present our answer to each of these briefly.

I.

The Decision of the Circuit Court of Appeals Does Not Conflict With or Misapply the *Tex-Mex* and *Hoboken Railroad* Cases. (Answer to First Reason, Petition, page 8, and Argument, pages 13-15.)

Whether it was the Susquehanna Trustee's notice of disaffirmance, as contended by the Petitioners, or the decision of the District Court, as held by the Circuit Court of Appeals, that was premature, the effect of the holding by the latter Court is that no disaffirmance of the 1904 and 1911 contracts can become effective without a prior application by the Susquehanna estate to the Interstate Commerce Commission under Section 77(o) of the Bankruptcy Act and Section 1(18) of the Interstate Commerce Act for leave to the New York Central to abandon operations over the Northern and Southern Extensions and a ruling by the Interstate Commerce Commission, on such application, that the public interest permits such abandonment.

The argument of the Petitioners on this first phase of their case is thus based on technicalities rather than on substance. If the Petition for writs of certiorari were granted and it were held, as requested by the Petitioners, that the Trustee's notice of disaffirmance rather than the District Court's order was premature, the effect would be the same as that of the decision of the Circuit Court of Appeals, namely, to remit the parties to the Interstate Commerce Commission.

The other fact relied on by the Petitioners in this connection, namely, that the Interstate Commerce Commission has already expressed the view, in the proceedings

on the Plan, that rejection of the 1904 and 1911 contracts in the Plan would not be in the public interest, was, we submit, properly disregarded by the Circuit Court of Appeals which concluded that the Commission should have the entire matter submitted to it. The Commission's reference to this subject was expressed without any evidence being taken on the question of abandonment of operations under Section 1(18) of the Interstate Commerce Act and Section 77(o) of the Bankruptcy Act or, indeed, on any aspect of the question of public interest, because, as noted, page 11, *supra,* the proposal that the Plan should contingently reject the contracts "was made for the first time on brief after the close of the hearings." (257 I. C. C. 593, 667 (1944)).

Under these circumstances, the Circuit Court of Appeals properly held that the entire matter should go to the Commission for primary determination on the public interest questions involved. Reference to the Commission will serve the triple purpose of permitting (a) its views to be determined on a record, (b) the issues to be presented to it correctly, in the light of the *Tex-Mex* case, namely, by an application under Section 1(18) of the Interstate Commerce Act and Section 77(o) of the Bankruptcy Act, and (c), since the Plan has not yet been presented to the District Court for approval, integration with the plan proceedings, the desirability, if not necessity, of which was pointed out by the Circuit Court of Appeals (C. App. p. 123).

The Circuit Court of Appeals had apparent regard for the desirability of not delaying these reorganization proceedings any longer than necessary and for that brigading of the judicial process with the administrative process

of the Commission to which this Court referred in *Palmer et al., Trustees* v. *Massachusetts,* 308 U. S. 79, 87 (1939). In *Thompson* v. *Texas Mexican Ry. Co.,* 328 U. S. 134 (1946), and *Smith* v. *Hoboken R. Co.,* 328 U. S. 123 (1946), this Court remitted the parties to the Commission for an authoritative and timely determination of the administrative phases of questions involved. That is also what has been done here.

II.

No Questions Were Decided by the Circuit Court of Appeals Which Should be Reviewed by This Court with Respect to the Application of Section 77 of the Bankruptcy Act to Rights of Others in Property or Agreements which the Trustee Has Acquired by Assignment or Purchase. (Answer to Second Reason, Petition, page 8, and Argument, pages 15-16 and 18-20.)

There is no clear statement in the Petition or supporting brief as to what the "important questions" are which it is said should be reviewed, but it would appear that the questions are those raised on pages 15-16 and 18-20 of the supporting brief.

The first of the questions raised on pages 15-16 involves whether the Trustee had a legal right to disaffirm agreements which had not been contracts of the Debtor. This is raised by the Petitioners' assumption that the 1904 contract was acquired by the Trustee "through assignment from others." (The Susquehanna was named as a party to the 1911 contract. Pt. II, p. 116.) The Court concluded, however (C. App., p. 119), that the 1904 contract had been a contract of the Debtor (the Susquehanna) at least since 1911, and was part of the estate which came into the Trus-

tee's possession. Whether the 1904 contract was a contract of the Debtor when these reorganization proceedings were instituted was a mixed question of fact and law, relating to events that took place many years ago. It presented no issue whatsoever as to the application of Section 77 of the Bankruptcy Act.

The second question presented on pages 15-16 of the Petitioner's brief, namely, whether the Trustee should be permitted to disaffirm contracts which he had assumed, is not involved at all. Whether he assumed the 1904 and 1911 contracts was a question of fact, or possibly a mixed question of fact and law. Therefore, even though the Trustee did not intend to assume the contracts and endeavored to make that clear (page 7, *supra*), he is compelled to abide by the lower Court's decision that he did assume them.

That does not end the matter, however. Entirely apart from the indication below that the Commission might, in the public interest, require termination of the New York Central's trackage rights regardless of the Trustee's assumption (C. App., pp. 122-123), the effect of the decision that the Trustee assumed the contracts is to remit their disaffirmance to the plan because Section 77(b) provides that the adoption of an executory contract by the Trustee "shall not preclude a rejection of such contract * * * in a plan of reorganization approved hereunder * * *." As stated by the Petitioners in their brief (p. 12):

> "The issues presented to the District Court involved primarily the question whether a right of disaffirmance existed at all—not simply a question whether the Trustee should be permitted to exercise a right of disaffirmance."

The Circuit Court of Appeals properly recognized that the decision that the Trustee had assumed the contracts did not conclude the question whether the contracts can be disaffirmed. There is no dispute, however, that once a Trustee has been held to have assumed contracts, he himself, of his own volition, cannot disaffirm them.

The question of rights in property, the basis for the remaining argument (Pets'. brief, pp. 18-20) in support of the second alleged reason for review, is *whether* the New York Central's subsidiary is vested with property rights in the Northern and Southern Extensions, not *how* vested property rights should be treated under Section 77. Thus no question is raised by this phase of the case under Section 77 of the Bankruptcy Act, and there is no suggestion of any conflict among the Circuits or with applicable local law.

III.

No Important Questions Are Presented Which Should be Reviewed by this Court with Respect to the Administration of the Bankruptcy Act and the Interstate Commerce Act and the Relative Powers and Duties of the Trustee, the District Court and the Interstate Commerce Commission. (Answer to Third Reason, Petition, page 9, and Argument, pages 17-18.)

Again there is no clear statement of what "important questions" are presented. The *Tex-Mex* and *Hoboken Railroad* cases are separately dealt with in the Petition (see Point I herein).

The argument that a collateral attack on an earlier ruling of the Interstate Commerce Commission is involved (Pets'. brief, pp. 17-18) is specious because the effect of the

decision of the Circuit Court of Appeals is to remit the entire matter to the Commission itself.

Moreover, the decision has, as indicated above at several points (pages 14-15, 16, *supra*), the necessary effect of integrating this disaffirmance litigation with the plan proceeding in which, even though the Trustee has assumed the contracts (§77(b)), the final ruling as to whether the contracts shall be rejected must be made in fairness to the other creditors of the estate. Cf. *Group of Inst'l. Investors* v. *C., M., St. P. & P. R. R. Co.*, 318 U. S. 523, at pages 549-550 (1943). The fact that the Trustee's acts which were found to constitute an assumption had judicial approval is of no significance because it is proper at all times for a trustee to obtain approval of an assumption (4 Collier on *Bankruptcy* (14th Ed.) §70.43, p. 1233) yet that does not preclude the rejection in the Plan permitted by Section 77; any Trustee's assumption, however made, is subject as a matter of law to the possibility of rejection in the Plan.

Conclusion

The New York Central and the Erie have for over four years been endeavoring to prevent the disaffirmance on behalf of the Susquehanna of the 1904 and 1911 contracts which were negotiated between the New York Central and the Erie at the Susquehanna's expense. The conclusions of the Circuit Court of Appeals that the contracts are contracts of the Debtor, executory at least in part, and that they did not create any vested interests in property, would establish the legal right to reject these contracts in the Plan, even though assumed by the Trustee, provided that the Commission finds that the public interest permits the New

York Central to abandon its operations over the Southern Extension and the Northern Extension—operations which have never been conducted by it except through the agency of the Susquehanna. The sooner the question of public interest can be brought before the Commission so that a record may be made thereon, the sooner these reorganization proceedings will be consummated.

We submit that the petitions for writs of certiorari should be denied.

Respectfully submitted,

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